

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ILTER SENER | : | DETERMINATION |
| D/B/A JIMMY'S GAS STATION | : | |
| | : | |
| for Revision of a Determination or for Refund | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period December 1, 1978 | : | |
| through November 30, 1980. | : | |

Petitioner, Ilter Sener d/b/a Jimmy's Gas Station, 237 Terrace Road, Bayport, New York 11705, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through November 30, 1980 (File No. 43382).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 5, 1987 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly estimated petitioner's gasoline sales on the basis of external indices.
- II. Whether the Audit Division properly imposed fraud penalty.

FINDINGS OF FACT

1. Petitioner, Ilter Sener d/b/a Jimmy's Gas Station, operated a gasoline service station located at 530 Franklin Avenue, Franklin Square, New York from December 1, 1978 through October of 1980. Petitioner did not perform any repairs.
2. On March 20, 1982, as a result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1978 through

November 30, 1980 for taxes due of \$131,432.67, plus penalty of \$65,716.35 and interest of \$35,656.04, for a total amount due of \$232,805.06. Subsequent to the issuance of the notice of determination and demand the Audit Division issued to petitioner a Notice of Assessment Review which contained the following explanation:

"As a result of a decision by the Mineola District Office, the above assessment has been reduced as follows: Tax in the amount of \$79,321.12, Penalty \$39,660.57 and Interest of \$22,873.81 computed to September 28, 1982."

3. The Audit Division first visited the business location on November 19, 1981 at which time it was determined that petitioner had ceased doing business on October 8, 1981. The auditor obtained the name and address of the previous owner, petitioner herein, and sent him a notice of the audit. On December 15, 1981, the Audit Division sent petitioner an appointment letter requesting all books and records pertaining to sales tax liability of Jimmy's Gas Station for the period December 1, 1978 through August 31, 1981 (the "audit period"), including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. At no time were any books or records of the business submitted to the Audit Division.

4. The Audit Division utilized third-party verification of gallons of gasoline purchased from Power Test, petitioner's supplier, in order to estimate petitioner's actual sales for the audit period. Power Test reported to the Audit Division that the total number of gallons purchased for the months of March through October 1980 was 423,568 gallons. Multiplying total gallons purchased by an estimated selling price of \$1.25 per gallon, a figure which was used at the time by the Audit Division based upon numerous gas station audits, yielded total taxable sales for the period March through October 1980 of \$529,460.00. Reported taxable sales were subtracted from this figure to arrive at additional taxable sales of \$355,489.00. The resulting percentage of error was 204.3380 percent. This percentage of error was applied to the taxable sales reported by the petitioner for each of the quarters in the audit period resulting in total additional taxable sales of \$1,133,158.97 which, when multiplied by the seven percent tax rate, yielded additional sales tax due of \$79,321.12.

5. The civil fraud penalty was recommended by the Audit Division because of the large understatement of taxable sales reported as compared to the audited taxable sales derived from the third party verification figures from Power Test. The Audit Division also asserted that it was reasonable to presume that the taxpayer had knowledge of the audit, but failed to submit books and records. Petitioner contended that marital problems at the time of the audit precluded compliance with the Audit Division's directives.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such record shall include a true copy of each sales slip, invoice, receipt or statement.

B. That petitioner did not have books and records available for audit. When records are not provided or are incomplete and insufficient, it is the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). The Audit Division properly determined petitioner's sales on the basis of third party verification of purchases of gallons of gasoline from Power Test and the Audit Division's experience with audits of similar businesses in accordance with section 1138(a) of the Tax Law.

C. That petitioner has the burden of showing that the method of audit and the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Petitioner has failed to sustain its burden of proof herein. No records, documents or credible testimony was produced at hearing to suggest otherwise.

D. During the period in issue, Tax Law § 1145(a)(2) provided:

"If the failure to file a return or pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest...."

Section 1145(a)(2) of the Tax Law was enacted by the legislature with the intent of having a penalty provision in the Sales and Use Tax Law which was similar to that already existing in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts of omission constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982.)

E. That the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. The evidence presented did not clearly establish that the returns filed by petitioner during the audit period were knowingly and deliberately filed in a manner which reflected false information and underreporting of tax collected and due. Accordingly, the fraud penalty is cancelled.

F. That the petition of Ilter Sener, d/b/a Jimmy's Gas Station is granted to the extent set forth in Conclusion of Law "E"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1982 and the Notice of Assessment Review issued September 13, 1982 in accordance with said modification; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
May 5, 1988

ADMINISTRATIVE LAW JUDGE